IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16154 of 2005

For Approval and Signature:
HONOURABLE MS. JUSTICE R.M.DOSHIT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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TENSILE STEEL LTD. & 1 - petitioners(s)
Versus
PUNJAB & SIND BANK & 2 - Respondent(s)

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Appearance :
MRS KETTY MEHTA for MR ASHOK L SHAH for petitioners(s) : 1 - 2.
MR AV TRIVEDI with MR ANIP A GANDHI for Respondent(s) : 1,
MR MR MENGDEY, AGP for Respondent(s) : 2,
NOTICE UNSERVED for Respondent(s) : 3,

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CORAM : HONOURABLE MS. JUSTICE R.M.DOSHIT

Date : 28/04/2006 – 01/05/2006

ORAL JUDGMENT

Heard the learned advocates.

RULE. Learned advocates Mr.Gandhi and Mr.Mengdey waive service of rule on behalf of the concerned respondent. With the consent of the learned advocates, petition is taken up for final hearing.

The petitioners before this Court are a company incorporated under the Companies Act, 1956 and one another (hereinafter referred to as, **"the Company"**), the borrowers in default. The respondent No.1 is the Punjab and Sind Bank Limited (hereinafter referred to as, "**the Bank"**). The Bank had extended financial assistance to the Company. The Company challenges the action of the Bank in initiating the recovery proceeding under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as, "**the Act of 2002"**) and the order of the District Magistrate, Vadodara made on 4th January, 2005 under Section 14 of the Act of 2002.

Mrs. Mehta has submitted that the action of the Bank in invoking the provisions contained in the Act of 2002 is illegal, made without the authority of law. She has submitted that the Company's account has not been declared to be the non-performing asset. The Bank, therefore, has no authority in law to invoke the provisions contained in the Act of 2002 for recovery of its dues. She has submitted that the Bank has instituted recovery proceeding before the Debt Recovery Tribunal (hereinafter referred to as, "**the Tribunal"**) on 1st October, 2002. The Bank having invoked the jurisdiction

of the Tribunal for recovery of its dues under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as, **“the Act of 1993”**), the Bank is debarred from taking measures for recovery of its dues against the secured assets under the Act of 2002. She has submitted that the Bank does have a remedy of recovery by sale of secured assets under the Act of 2002. However, the Bank does have equally efficacious remedy for recovery of its dues under the Act of 1993. As the Bank has two separate and distinct remedies available the doctrine of election of remedy shall come into play. The Bank must decide whether it wants its recovery to be made through the process of adjudication under the Act of 1993 or by the measures taken against the secured assets under the Act of 2002. She has further submitted that the Company has offered to settle its account under 'One Time Settlement' scheme introduced by the Reserve Bank of India. So long as the Company's application for settlement of account is pending, its assets cannot be recovered by the Bank. She has further submitted that on receipt of the notice under Section 13(2) of the Act of 2002 the Company has lodged its objections. The said objections have not yet been considered and decided. Unless the said objections are considered, decided and the decision is communicated to

the petitioners, the Bank has no authority to take measures under Section 13(4) of the Act of 2002. She has further submitted that against the loan of Rs.40 lakhs advanced by the Bank, the Bank has sought to recover a sum of Rs.25 crores. The Bank has failed to submit its accounts and to justify the recovery sought to be made by it. On receipt of the notice under Section 13(2) of the Act of 2002, the petitioners had lodged objections. The Bank was under an obligation to consider and decide the said objections and to communicate the decision thereof. In absence of such consideration or communication the Bank had no authority to proceed further with taking over the possession of the secured assets. She has submitted that the impugned notice does disclose that the Bank has charged penal interest and has also claimed interest over such interest i.e. the Bank has capitalized on the penal interest. She has submitted that the Bank is not empowered to capitalize on penal interest. She has submitted that the matter had once been settled with the Bank. The Bank had agreed to settle the accounts for a sum of Rs.2.75 crores. Of the said amount the petitioners had paid a sum of Rs.96 lakhs, which the Bank had accepted. The Bank having accepted the offer for settlement, is debarred from proceeding with the recovery procedure either before the Tribunal or under the Act of

2002. In support of her submissions, Mrs. Mehta has relied upon sub-section (3A) of Section 13 of the Act of 2002 and the proviso to Section 19 of the Act of 1993. She has relied upon the judgments of the Hon'ble Supreme Court in the matters of **Bihar State Co-operative Marketing Union Ltd. v/s. Uma Shankar Sharan and another** [(1992)4 SCC 196]; of **Andhra Pradesh State Financial Corporation v/s. M/s. GAR Re-rolling Mills and another** [AIR 1994 SC 2151]; of **Central Bank of India v/s. Ravindra and others** [AIR 2001 SC 3095]; of **Unique Butyle Tube Industries (P) Ltd. v/s. U.P.Financial Corporation and others** [(2003)2 SCC 455]; of **Mardia Chemicals Ltd. v/s. Union of India and others** [AIR 2004 SC 2371] and of Punjab and Haryana High Court in the matter of **Kalyani Sales Company and another v/s. Union of India and another** [I (2006) BC 1].

The petition is contested by Mr.Trivedi. He has relied upon the counter-affidavit made by the Bank. He has submitted that Section 17 of the Act of 2002 provides a complete remedy to the aggrieved persons. Against the impugned action of the Bank an appeal shall lie to the Debt Recovery Tribunal as envisaged under Section 17 of the Act of 2002. The present petition, therefore, deserves to be dismissed on the ground of availability of

alternative, efficacious, statutory remedy. He has submitted that Section 14 of the Act of 2002 does not envisage a notice to the borrowers or the guarantors. The order made by the District Magistrate under Section 14 of the Act of 2002, therefore, shall not be vitiated for want of notice to the petitioners. In support of his contentions Mr.Trivedi has relied upon the judgments of the Gujarat High Court in the matters of **Punjab National Bank v/s. O.C.Krishnan and others** [(2001)6 SCC 569]; of **Gujarat Fisheries Central Co-op. Association Ltd. v/s. Union of India and others** [2004(1) D.R.T.C. 90]; of **Kundanben Jayantilal Sanghvi v/s. State Bank of Saurashtra** [2005(2) D.R.T.C. 129] and of **Bank of Rajasthan Ltd. v/s. Karan Fibres and Fabrics Ltd. and others** [2003(2) GLR 1392].

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It is not in dispute that the Company has made a reference to the BIFR under the Act of 1985. Section 22 of the Act of 1985 provides for suspension of legal proceedings, contracts, etc. pending any inquiry or preparation of a scheme or during implementation of the sanctioned scheme in respect of an industrial company. However, Section 15 of the Act

of 1985 has been amended by Section 41 of the Act of 2002. By the said amendment a proviso has been added to sub-section (1) of Section 15 of the Act of 1985 which reads as under:

> **"Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where financial assets have been acquired by any securitisation company or reconstruction company under sub-section (1) of section 5 of that Act:**
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> **Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance**

disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of section 13 of that Act."

In view of the above proviso, on the Bank's taking any measure under Section 13(4) of the Act of 2002 to recover its dues the proceeding pending before the BIFR shall stand abated. Reference pending before the BIFR, thereafter shall not give further protection to the borrower much less to the guarantors.

Next is the question whether the Bank was obliged to withdraw the proceeding pending before the Tribunal before it elected to invoke its right under the Act of 2002.

To examine this issue, one has to refer to Section 19 of the Act of 1993. Section 19 of the Act of 1993 provides, inter alia, for application to the Tribunal. It empowers a bank or a financial institution, which has to recover any debt from any

person, to make an application to the Tribunal. The first proviso to sub-section (1) of the said Section 19 enables a bank or a financial institution to seek permission of the Tribunal to withdraw the application for the purpose of taking action under the Act of 2002. The said Section 19(1) and the proviso thereof read as under :

> **“Application to the Tribunal.--(1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction--**
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> **(a) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or**
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> **(b) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or**
>
> **(c) the cause of action, wholly or in part,**

arises:

Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it, withdraw the application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 for the purpose of taking action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), if no such action had been taken earlier under that Act:"

The contention is that though the proviso says that the bank or the financial institution "may" seek permission to withdraw the application. The said proviso is mandatory in nature i.e. in case the bank or the financial institution intends to enforce the security interest as envisaged by the Act of 2002, it is imperative for such bank or financial institution to first withdraw the application pending before the Tribunal. In other words, the bank or the financial institution is required to choose to proceed against

the debtor either by making application to the Tribunal under the Act of 1985 or to recover its dues from the secured assets as envisaged by the Act of 2002. It is not open to the bank or the financial institution to avail of both the remedies simultaneously. That is the view expressed by the Punjab and Haryana High Court in the matter of Kalyani Sales Company and another (supra). The learned Judges of the said High Court has invoked the doctrine of election of remedy and has held that, **"...The doctrine of election is a rule of estoppel. It is an obligation imposed upon a party by the Court of equity to choose between two inconsistent or alternative rights or claims.**" The Hon'ble Judges have, in paragraph 38 of the judgment, held that, "**...The first proviso to Section 19 gives statutory recognition to the doctrine of election which contemplates that one remedy can be taken in respect of one action. Such intention can be gathered from Para 6 of the Statement of Objects and Reasons as well as from the provisions of Sub-section (10) of Section 13 of the Act which contemplates filing of an application for recovery of the shortfall after secured assets in terms of the Act has been realised. The second and the third provisos to Section 19 of the RDB Act also**

contemplate an expeditious decision on an application for withdrawal of the application made under the provisions of Section 19(1) to enable the Bank to have action under the Act. Thus, we hold that though it is discretionary for the Bank to proceed under the Act, but if the Bank or the financial institution chooses to take recourse to the Act, it is mandatory for the Bank or the financial institution as the case may be, to withdraw its application made to the Debts Recovery Tribunal." Consequently, it has been held that, "**...Thus, we conclude that the Bank or financial institution has to elect its remedy to either proceed under the RDB Act or to withdraw such proceedings to enable them to initiate action under the Act**."

The Bombay and the Kerala High Courts, however, have a different view. The Kerala High Court has, in the matter of **Sahir Shah v/s. Bank of India** [2006(1) ISJ (Banking) 263], held that, "...**It is not mandatory on the part of the Bank or Financial Institution to make an application before the Tribunal or to seek permission before invoking the provisions of the Securitisation Act. The power conferred on the Tribunal under the third proviso to S.19(1)(c) is only to refuse or grant**

permission for withdrawal. No power is conferred on the Tribunal under the RDB Act to prevent the Bank or Financial Institution from invoking the provisions of the Securitisation Act. Only power conferred on the Tribunal is to decide as to whether the request for withdrawal of the application pending before the Tribunal could be granted or not."

The Bombay High Court has taken a similar view but in different way. The Bombay High Court has, in the matter of **Wardhaman Shamjibhai Dharamsi and another v/s. Bank of Maharashtra** [2006(1) DRTC 339], held that, **"...Assuming for a moment that the proviso applies, does the proviso lead to the inference that a creditor has to elect to move either under one of the two Acts. As noted earlier, the action under Sec.13 is without intervention of the Courts. Considering Sec.37 read with 35 it is open to a secured creditor to move under the SRFAESI Act and there is no bar. Under the SRFAESI Act the secured creditor will not be moving a Court for relief and no adjudicating process is involved. In so far as RDDBFI Act is concerned, it is a Tribunal on which certain powers under the CPC have been conferred. If the proceedings initiated under Sec.19 had already been initiated then by**

virtue of the proviso as illustrated, liberty is given to the financial institution or the bank to move the D.R.T. To withdraw the application whether made before or after the amendment in the SRFAESI Act, if no such action had been taken earlier. This is only an enabling power. The power is conferred on the Tribunal, whether to grant permission or not to grant permission. At the highest, therefore, all that can be said is that if a creditor had already applied under the provisions of Sec.19 of RDDBFI Act then he cannot withdraw those proceedings except with the leave of the Court. No where does Sec.19 expressly or impliedly bar the remedy of the creditor in moving under the SRFAESI Act. This could not have been done considering the provisions of Secs.35 and 37 of the SRFAESI Act."

The Madras High Court has, in paragraph 28 of the unreported judgment in the matter of **M/s.Digivision Electronics Ltd. v/s. Indian Bank and another** [W.P.No.13056 of 2005 decided on 7th July, 2005], recorded its opinion "**...Hence, in our opinion, if notice under Section 13(2) had been issued prior to 11.11.2004, there is no requirement to take permission from the Debts Recovery Tribunal for withdrawal of an application**

pending before it. It is only where notice under Section 13(2) is sought to be issued subsequent to 11.11.2004 that permission for withdrawal of an application pending before the Debts Recovery Tribunal is necessary; and no action can be taken under the Securitisation Act before grant of such permission by the Tribunal."

What could be the legislative intent ? Does not a right to withdraw the pending proceeding inhere in every litigant ? Is it not inherent that a legal proceeding pending before any court or judicial forum cannot be withdrawn without the express permission of that court or the judicial forum ? If withdrawal of any legal proceeding with the permission of the court is permissible under ordinary law, why should the legislature specifically provide for application for such permission. If the legislative intent were to make it compulsory to withdraw the pending proceeding before the Tribunal, the legislature has not said so in specific terms. In my view, it would be incongruent to say that a pending proceeding be withdrawn with the permission of the Tribunal for the purpose of recovering the dues from the secured assets and to file a further proceeding in case the sale proceeds from the sale of the secured assets do not satisfy the dues in its entirety. Neither

the above proviso (unlike sub-rule (3) of Rule 1 of Order XXIII CPC) nor the sub-section (10) of Section 13 provides for making application afresh after it is once withdrawn as envisaged by the aforesaid proviso.

I am in respectful agreement with the view expressed by the Bombay High Court. The aforesaid proviso to Section 19 has been inserted with effect from 11th November, 2004 by Act 30 of 2004. The proviso does refer to the withdrawal of the application pending before the Tribunal for the purpose of taking action under the Act of 2002. The question, however, is whether it is a mandatory requirement to withdraw the pending application. If this proviso were construed to provide for a mandatory requirement, what would be the consequence thereof. As recorded hereinabove, the word used is “may” and not “shall” as it is usually used to connote a mandatory requirement. Besides, the statute does not provide for consequences either in case of withdrawal of the pending application or in case of non-withdrawal of such application. Further, sub-section (10) of Section 13 of the Act of 2002 provides that, “**...Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner**

as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower." Thus, what is contemplated is that in case the sale proceeds of the secured assets do not fully satisfy the dues of the secured creditors, the secured creditor may make an application to the Tribunal for recovery of the balance amount from the borrower i.e. if the proviso were construed to be mandatory, a bank or financial institution would be required to first withdraw the pending application than to proceed to recover its dues from the secured assets as envisaged by the Act of 2002 and then, in case the sale proceeds are not sufficient to satisfy its dues, to file another application before the Tribunal for recovery of the balance of the amount. Thus, it would lead to multiplicity of the proceedings. That would also raise various other questions like what should happen to an order of attachment if made under sub-section (15) of Section 19 of the Act of 1993. Moment the application is permitted to be withdrawn, such order made pending the application would cease to operate. In that case, would not the borrower in default be given a free reign to fritter away the properties earlier under attachment by the Tribunal. The question of limitation should also arise as Section 24 of the Act of 1993

provides that, **"...The provisions of the Limitation Act, 1963 (36 of 1963), shall, as far as may be, apply to an application made to a Tribunal."** If the Legislature intended the aforesaid proviso to be mandatory, the Legislature would have provided for extension of period of limitation as it has been done in the Act of 1985. Section 22 of the Act of 1985 provides for suspension of the legal proceedings and contracts. In view of the suspension of the proceedings under sub-section (1) of Section 22 of the Act of 1985, the Legislature has extended the period of limitation by a specific provision made in sub-section (5) of the said Section 22 as under :

> **"In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded."**

In the present case, however, though Section 24 of the Act of 1993 provides that the Limitation Act shall apply, the Legislature has not provided for the extension of period of limitation by such period during which the application pending before the Tribunal is withdrawn with the permission of the Tribunal and till the measures taken under the Act of 2002 are completed. In other

words, if the bank or the financial institution elects to recover its dues from the secured assets under the Act of 2002, it may have to forgo its claim over the balance of the dues as by that time the period of limitation may expire. In the alternative the bank or the financial institution, with a view to saving the period of limitation, will have to proceed further before the Tribunal. In that case, the statutory remedy available to the bank or the financial institution under the Act of 2002 would be denied. The purpose of the Act of 2002 in such case would be defeated.

In my opinion both views, one expressed by the Punjab and Haryana High Court and the other expressed by the Bombay High Court are possible. But, the principles of interpretation of statute do not permit a Court of law to take a view which would lead to multiplicity of proceedings. I am, therefore, inclined to hold that the proviso to sub-section (1) of Section 19 of the Act of 1993 which provides for withdrawal of the application pending before the Tribunal is directory and not mandatory. In other words, a bank or a financial institution which has approached the Tribunal either before or after 11th November, 2004, if so chooses, may avail of the remedy under the Act of 2002 without first

withdrawing the application pending before the Tribunal.

The contention that pending offer of settlement made by the Company no proceeding under the Act of 2002 could have been initiated requires to be rejected outright. It has been pointed out in the counter-affidavit that the said settlement was arrived at as far back as in the year 2001. The Bank had agreed to accept a sum of Rs.275 lakhs in settlement of the account of the Company in addition to Rs.96 lakhs paid by the Company on condition that the Company paid the said sum of Rs.275 lakhs within three months from the date of communication of the sanction by the Bank. It is stated that the Company failed to honour its commitment under the said settlement. In view of the Company's failure to pay the sum of Rs.275 lakhs as agreed, the Bank has become entitled to recover its dues in its entirety.

The fact that the petitioners failed to pay the sum of Rs.275 lakhs as agreed is not denied. The settlement having failed the Bank is justified in recovering its dues.

The contention that the impugned order of the District Magistrate made on 4th January, 2005 is illegal and void inasmuch as no notice was issued to the

petitioners nor they were afforded opportunity of hearing before the District Magistrate also requries to be rejected. It should be noted that Section 14 of the Act of 2002 is in the nature of executing the order. It does not contemplate a notice to the borrower/guarantor or hearing the borrower/guarantor.

The question of justifying the Bank's claim or whether or not the Bank is entitled to capitalize on the penal interest cannot be decided in the present petition preferred under Article 226 of the Constitution of India. The said questions are required to be considered and decided by the Tribunal in the recovery proceeding pending before it.

This brings me to the last of the contentions which, in my view, requires to be upheld. It is the grievance of the Company that the objections raised by it against the notice for remittance of the dues issued by the Bank under Section 13(2) of the Act of 2002 have not been considered by the Bank. It is not denied that the said reply had been received by the Bank. However, the Bank did not consider and decide the same. Sub-section (3A) of Section 13 of the Act of 2002 enjoins the Bank to consider and decide such reply/objection and to

communicate the decision thereof. Unless and until the said exercise is completed, the Bank is not authorised to proceed further and take any of the measures under sub-section (4) of the said Section 13. In the present case, it is indisputable that the Bank, without complying the mandatory requirement under sub-section (3A) of the said Section 13, proceeded further under sub-section (4) of the said Section 13; took the assistance of the District Magistrate under Section 14 of the Act of 2002; and took over the possession of the secured assets. The action of the Bank is certainly contrary to the statutory mandate. The same requires to be quashed and set-aside on that ground alone.

In the result, this petition shall succeed. The action of the respondent Bank in taking over possession of the secured assets is set-aside. The Bank is directed to restore the possession of the secured assets to the petitioners within two months from today on condition that the Bank will maintain status quo as to the possession and use of the properties in question.

It is clarified that the Bank shall be at liberty to proceed under the Act of 2002 after considering and deciding the reply submitted by the petitioners on 24th February, 2004 and after communicating its decision to

the petitioners.

Rule is made absolute in the above terms. The parties shall bear their own cost.

(Ms. R.M.Doshit, J.)

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